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No. 91-7873

In The

# Supreme Court of the United States

October Term, 1992

WILLIAM FEX,

*Petitioner,*

v.

MICHIGAN,

*Respondent.*

On Writ of Certiorari
To The Supreme Court Of Michigan

## BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

I

SHOULD THE DECISION OF THE MICHIGAN SUPREME COURT THAT THE 180-DAY TIME LIMIT UNDER ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS DOES NOT COMMENCE WHEN THE DEFENDANT SUBMITS THE REQUEST FOR FINAL DISPOSITION TO THE PRISON AUTHORITIES IN THE SENDING STATE BE REVERSED BECAUSE IT IS IN ERROR AND CONFLICTS WITH DECISIONS OF OTHER COURTS?

II

DID THE MICHIGAN SUPREME COURT ERR IN THAT IT NEITHER HELD THAT THE 180-DAY PERIOD IN WHICH A DEFENDANT MUST BE BROUGHT TO TRIAL UNDER THE IAD BEGAN BEFORE THE PETITIONER WAS NOTIFIED OF A DETAINER BECAUSE HE WAS IMPRISONED FOR SEVERAL MONTHS WHILE THERE WAS A PENDING ARREST WARRANT OF WHICH THE PRISON AUTHORITIES HAD KNOWLEDGE NOR REMANDED THE CASE FOR A HEARING TO DETERMINE WHETHER ANY DELAY WAS REASONABLE?

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## DECISIONS BELOW

The Petitioner was convicted in the Jackson Circuit Court, in No. 88 49555 FC. Judgment was entered on March 23, 1989. This judgment was not reported. The judgment was reversed by the Michigan Court of Appeals in an unreported decision. *People v. William Fex*, No. 119192 (Mich. App. 1991); Jt. App. at 38.

The Supreme Court reversed. *People v. William Fex*, 439 Mich. 117, 479 N.W.2d 625 (1992); Jt. App. at 40. The Petitioner is asking for a reversal of the decision of the Michigan Supreme Court.

## JURISDICTION

This case is before the Court on certiorari granted with regard to a decision of the Michigan Supreme Court. The Michigan Supreme Court interprets the Interstate Agreement on Detainers, MICH. COMP. LAWS ANN. § 780.601, MICH. STAT. ANN. § 4.147(1), in conflict with the interpretation of other state courts of last resort of state enactments of the Interstate Agreement on Detainers and with the interpretation of courts of the United States of the federal enactment, 28 U.S.C.A. App. § 2. This petition follows the People's appeal by leave from reversal of a conviction of Armed Robbery, MICH. COMP. LAWS ANN. § 750.529, MICH. STAT. ANN. § 28.797 and Felony Firearm, MICH. COMP. LAWS ANN. § 750.227b, MICH. STAT. ANN. § 28.424(2). (Judgment and Probation/Commitment Order, April 20, 1989).

Petitioner was convicted in the Jackson Circuit Court on March 23, 1989. *Id.* Sentence was imposed on April 20, 1989. *Id.* The Defendant-Appellant requested appointment of counsel within 56 days on June 9, 1989. Counsel was appointed on June 12, 1989. A timely claim of appeal was filed within 56 days of the appointment of appellate counsel after a timely MOTION TO APPOINT APPELLATE COUNSEL on June 5, 1989. (Claim of Appeal).

The Michigan Court of Appeals reversed the conviction. *PEOPLE OF THE STATE OF MICHIGAN v. WILLIAM FEX*, No. 119192 (Mich. App. June 21, 1991). Leave to appeal the decision was requested of the Michigan Supreme Court within 21 days. Without granting leave to appeal, the Michigan Supreme Court reversed the Court of Appeals decision. *PEOPLE OF THE STATE OF MICHIGAN v. WILLIAM FEX*, No. 91979 (January 9, 1992). A petition for certiorari was filed April 7, 1992, within 90 days of the decision of the Michigan Supreme Court. Petitioner seeks review under jurisdiction of 28 U.S.C.A. § 1257(a).

## STATUTES CONSTRUED

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial



within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request

for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * *

Interstate Agreement on Detainers, Art. III, 18 U.S.C.A. App. § 2.



Article VI

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

Interstate Agreement on Detainers, Art. VI, 18 U.S.C.A. App. § 2.

## STATEMENT OF FACTS

This matter was occasioned by the armed robbery of a Rax drive-in restaurant on December 8, 1987. Tr. at 48 (March 23, 1989). No one was arrested, but a complaint was issued against the Petitioner. Complaint, Jt. App. at 2 (February 29, 1988). The complaint fully identified the Petitioner, showing that he was in custody in Fort Wayne, Indiana. The Petitioner was then awaiting disposition of two robbery charges in Indiana. Presentence Report at 5 (April 7, 1989).

According to the presentence report, the Petitioner was sentenced to prison in Indiana on May 24, 1988, although counsel urged at trial that the date was April 23, 1988. Tr. at 3. In either case, the Petitioner has not been able to establish that there was any activity in Michigan or Indiana with regard to the Michigan case until September 7, 1988. On that date, the Petitioner was served with a NOTICE OF UNTRIED INDICTMENT, INFORMATION

OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION under the Interstate Agreement on Detainers, with accompanying forms, by Indiana prison authorities. *See* Jt. App. at 5-16. He immediately signed the forms and returned them to the prison officials.

It is not clear what happened next, but copies of two envelopes are in the court file. One, dated September 9, 1988, apparently contained an OFFER TO DELIVER TEMPORARY CUSTODY bearing that date, addressed to the Jackson County Prosecutor. Jt. App. at 17. According to the prosecutor, the other envelope, dated Thursday, September 22, 1988, contained the INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS (REQUEST FOR DISPOSITION) dated September 7, 1988. The prosecutor asserts that this envelope was received on Monday, September 26, 1988. The Petitioner's jury trial started on March 22, 1989.

The Defendant moved, unsuccessfully, for dismissal because he was not tried within 180 days of his REQUEST FOR DISPOSITION under the Interstate Agreement on Detainers (IAD), MICH. COMP. LAWS ANN. § 780.601, MICH. STAT. ANN. § 4.147(1). The court of appeals reversed. *People v. William Fex*, No. 119192 (Mich. App. June 21, 1991). The People's application for leave to appeal ensued.

The Michigan Supreme Court held that the decision of the court of appeals was erroneous because the 180-day period should have started on September 26, 1988, when the prosecutor received the REQUEST FOR DISPOSITION, not from September 7, 1988, when it was given to prison authorities. Defendant-Appellee responds that



the decision of the court of appeals was correct for the reasons stated in the unanimous per curiam decision.

## SUMMARY OF ARGUMENT

This is a federal question on certiorari from the Michigan Supreme Court. The Petitioner was convicted of Armed Robbery, MICH. COMP. LAWS ANN. § 750.529, M.S.A § 28.797 and Felony Firearm, MICH. COMP. LAWS ANN. § 750.227b, MICH. STAT. ANN. § 28.424(2), by a jury in the Jackson County Circuit Court. (Judgment and Probation/Commitment Order, April 20, 1992).

The Michigan Court of Appeals reversed the conviction, holding that the 180-day period in which the state must bring a defendant to trial under the Interstate Agreement on Detainers (IAD), Art. III(a), 18 U.S.C.A. App. § 2, commences when prisoner tenders a REQUEST FOR DISPOSITION under that act to prison authorities in the sending state. *People v. William Fex*, No. 119192 (June 21, 1991). The IAD concerns the disposition of detainers pending against defendants who are incarcerated under sentence in other states, and the transfer of such defendants to a state in which a detainer is pending.

The Michigan Supreme Court reversed the Court of Appeals, holding that the 180-day period does not commence until the REQUEST FOR DISPOSITION is received by the prosecutor in the receiving state. *People of the State of Michigan v. William Fex*, 439 Mich. 117, 479 N.W.2d 625 (1992). Petitioner seeks review of that decision under jurisdiction of 28 U.S.C.A. § 1257.

A prisoner need only convey the written notice and REQUEST FOR DISPOSITION to appropriate prison officials to fulfill the requirements of the IAD. For this reason service is complete when the prisoner tenders the REQUEST FOR DISPOSITION to his warden's representative and the 180-day period under the IAD should begin to run. It is the Respondent's contention that the period does not run until the request is received by the Prosecutor in the receiving state. Petitioner urges that the period should begin when the prisoner tenders the request to prison authorities in the sending state. There are decisions supporting both sides, but the Petitioner believes its position represents both the majority and the correct view.

Calculating the 180-day period from the date the defendant tenders the request to prison authorities prevents sending state officials from diluting or vitiating the inmate's right to speedy trial once invoked. Fairness requires the burden of compliance with the requirements of the IAD to be placed entirely on the law enforcement officials involved, since the prisoner has little ability to enforce compliance. The interpretation urged by the Petitioner, and adopted by numerous courts, would not impede the orderly administration of justice. The prosecutor would lose no more than the few days it takes for mail to be delivered. Where there is a lengthy delay in delivery, or where the REQUEST FOR DISPOSITION is lost in the mail, the IAD permits the prosecutor to request a continuance. The prosecutor should experience little difficulty in showing the date on which the request was mailed and the date on which it was received, or that it was never received. The defendant would not be forced



to prove that an unexplained delay was occasioned by prison authorities when all of the evidence in question is in the hands of an adversary. If the court rules in Respondent's favor, there would be little incentive for officials in either sending or receiving states to transmit a REQUEST FOR DISPOSITION promptly.

The Petitioner further urges that the 180-day deadline should have been calculated from the date he was sentenced, not the date he was informed of his rights. He was not informed of his rights under the IAD until several months after he had been sentenced while there was a pending detainer from another state. The IAD provisions are triggered when a "detainer" is filed with the custodial state by the state having untried pending charges. A detainer is a "notification filed with the institution where a prisoner is serving a sentence advising him that he is wanted to face pending criminal charges in the notifying state."

According to the IAD, once the detainer was placed on the Defendant, the Indiana prison authorities were obligated to inform the Defendant of his right to final disposition without delay. A prisoner should not be penalized if the prison officials fail to carry out their duties under the IAD. The burden of the violation by the officials in the sister state should fall on the shoulders of the prosecutor. Therefore, the delay must be attributed to the prosecution. Since the Defendant was not promptly advised of his rights under the IAD, he was denied equal protection under the law. The 180-day limit should have started to run from the date of the Defendant's sentencing. The Michigan Supreme Court's decision that the 180

days does not begin until September 26, 1988 was in error.

## ARGUMENT

### I

### THE DECISION OF THE MICHIGAN SUPREME COURT THAT THE 180-DAY TIME LIMIT UNDER ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS DOES NOT COMMENCE WHEN THE DEFENDANT SUBMITS THE REQUEST FOR FINAL DISPOSITION TO THE PRISON AUTHORITIES IN THE SENDING STATE CONFLICTS WITH DECISIONS OF OTHER COURTS AND SHOULD BE REVERSED.

A Defendant must be brought to trial, or proceedings initiated, within 180 days on any untried indictment, information or complaint which is the basis for the detainer lodged against him. Interstate Agreement on Detainers (IAD), Art. III(a), 18 U.S.C.A. App. § 2. A prisoner need only convey the written notice and REQUEST FOR DISPOSITION to the appropriate prison officials to completely fulfill the requirements set forth under the IAD. For this reason service is complete when the prisoner tenders the request for disposition to his warden's representative and the 180-day period under the IAD should begin to run. It is the Respondent's contention that the period does not run until the request is received by the prosecutor in the receiving state. Petitioner urges that the period should begin when the prisoner tenders the request to prison authorities in the



sending state. There is a clear split of authority on this point. According to the Respondent, the ruling of the Michigan Supreme Court agrees with the majority view. Careful analysis reveals that the Respondent is mistaken. For ease of analysis, the relevant cases are grouped by type.

### A. CASES ON WHICH PETITIONER RELIES

A 1986 Massachusetts Supreme Court decision is the clearest expression of this interpretation of the IAD. *Commonwealth v. Martens*, 500 N.E.2d 282 (Mass. 1986). The court held that the 180-day period begins when a Defendant files his request for final disposition with the correctional authorities, not when those authorities forward the request to the receiving State. A prisoner need only transmit the written notice and request for disposition to the appropriate custodial officials and he has fulfilled his responsibility. Should the custodial state refuse or fail to forward the request to the receiving state, the receiving state, not the prisoner, is bound by that failure. *Id.* at 284.

Numerous other courts have held similarly. *Burns v. State*, 578 S.W.2d 650 (Tenn.Crim.App. 1978) (Failure of prison officials to notify the authorities in receiving state cannot be attributed to the Defendant); *Pittman v. State*, 301 A.2d 509 (Del. 1973) (prisoner has no supervisory power and prison official has no discretion not to transmit the REQUEST FOR DISPOSITION immediately); *Rockmore v. State*, 21 Ariz.App. 388, 519 P.2d 877 (1974) (release for failure to prosecute within 180 days could not be denied because officials of state sending the petition failed to send appropriate certificate); *Ward v. State*, 435

N.E.2d 578 (Ind. Ct. App. 1982) (request for speedy trial given to prison case manager was suitable written notice and request as required by IAD and triggered 180-day time period); *Gibson v. Klevenhagen,* 777 F.2d 1056 (5th Cir. 1985) (where prisoner sent repeated IAD requests to prosecutor in receiving state, IAD notice requirements are satisfied); *People v. Masselli,* 234 N.Y.S.2d 929, 12 App. Div.2d 366 (1962) (requirement of notice and request for final disposition was satisfied when forms were served on chief clerk of the prison); *State v. Ferguson,* 41 Ohio App.3d 306, 535 N.E.2d 708 (1987) (sending state official's failure to send the certificate of inmate status should not vitiate inmate's right to speedy trial once invoked); *State v. Lippolis,* 101 N.J. Super. 435, 244 A.2d 531 (1968) (burden of compliance with the requirement of the IAD is placed entirely on the law enforcement officials involved); *State v. Tarango,* 105 N.M. 592, 734 P.2d 1275 (N.M. Ct. App. 1987) (prisoner need only serve written notice and REQUEST FOR DISPOSITION on corrections officials of sending state; prisoner may serve prosecutor in receiving state directly, but bears burden of serving a notice which conforms to technical requirements of IAD when she does so); *United States v. Hutchins,* 489 F.Supp. 710 (N.D.Ind. 1980) (U.S. Marshall stepped into jail commander's shoes for purposes of accepting the Defendant's IAD request; government cannot claim that mistakes of its agents voided Defendant's rights under IAD); *United States v. Reed,* 910 F.2d 621 (9th Cir. 1990) (deputy notified defendant of detainer, but improperly filled out form causing delay in notice to prosecutor).



## B. OUTSTANDING DETAINERS FROM MULTIPLE JURISDICTIONS

In two cases the authorities in the sending state delayed transmitting the REQUEST FOR DISPOSITION while action was being taken on outstanding detainers from other states. These cases hold that the 180-day period commences on receipt of the REQUEST FOR DISPOSITION by the prosecutor in the receiving state, but are cases in which there are outstanding detainers placed by two or more states. *State v. Moore,* 774 S.W.2d 590 (Tenn. 1989) (time period did not begin to run until the receiving state was given notice despite fact that sending state held REQUEST FOR DISPOSITION for 225 days while defendant was in custody of sending state); *State v. Walton,* 734 S.W.2d 502 (Mo. 1987). Art. III(a) only provides for continuance granted by the court on good cause, not unilateral delay by prison authorities. IAD, Art. III(a), 18 U.S.C.A. App § 2. The IAD directs prison officials to notify all appropriate prosecutors and courts "forthwith." IAD, Art. III(d), 18 U.S.C.A. App. § 2. To allow prison officials to ignore the obligation to transmit the REQUEST FOR DISPOSITION immediately is contrary to the express provisions of the statute. On the other hand, the IAD does not provide direction in dealing with detainers from multiple jurisdictions. This is a special circumstance on which the lower courts should have guidance, but permitting the prison officials of the sending state to forward the documents at their own discretion is clearly contrary to the letter and the intent of the IAD.

## C. PRISONER SENDING REQUEST FOR DISPOSITION DIRECTLY TO PROSECUTOR

Several cases concerned attempts by prisoners to invoke the protection of the IAD by communicating directly with the prosecutor or court in the receiving state. In one case, the federal district court in Delaware held that the defendant was subject to more strict technical requirements because he attempted to serve the court in the receiving state instead of tendering them to the corrections officials in the sending state. *Beebe v. Vaughn*, 430 F.Supp. 1220 (D. Del. 1977). The Ohio Court of Appeals held that the 180-day period did not begin to run because the defendant's REQUEST FOR DISPOSITION, mailed directly to the prosecutor, was not accompanied by a certificate of inmate status. *State v. Reitz*, 26 Ohio App.3d 1, 498 N.E.2d 163 (1984).

The IAD does not provide for submission of the REQUEST FOR DISPOSITION by the prisoner to the prosecutor. Despite this, it is reasonable for the court to interpret the IAD to permit the prisoner to circumvent a possibly hostile prison administration. When the prisoner undertakes to bypass the procedure provided in Art. III(b), she assumes the burden of conveying notice to the prosecutor, including technical requirements normally the responsibility of the officials in the sending state. *McCallum v. State*, 407 S.2d 865 (Ala. Cr. App. 1981). Requiring strict adherence to the technicalities of the IAD by the "self-help" prisoner reduces the likelihood that the prisoner will use the statute offensively to frustrate the ends of justice. *People v. Daily*, 46 Ill. App.3d 195, 205, 360 N.E.2d 1131, 1137 (1977). The certificate of inmate status



described in Art. III(a) is an important part of the notice. It informs the prosecutor of the inmate's circumstances permitting the prosecutor to make an informed decision regarding disposition of the case. *Id.* at 206, 360 N.E.2d at 1138; *see also Beebe v. Vaughn*, 430 F.Supp. at 1221 (defendant sent papers which were not IAD forms to nonexistent official); *People v. Wilson*, 69 Cal. App.3d 631, 138 Cal. Rptr. 259 (1977) (prisoner's informal request did not trigger 180-day time limit because essential information was missing); *Holland v. State*, 352 N.E.2d 752 (Ind. 1976) (defendant caused letter to be sent to Indiana prosecutor requesting a trial, presumably not IAD form).

*Holland* is anomalous because the trial started on February 23, 1975, a Sunday. This was only the 181st day after the prisoner *mailed* the request. *Id.* at 757. If that is true, Saturday, February 22, 1975 would not have counted and the trial was properly brought within the time limit counting from the mailing date, August 26, 1974.

The Colorado Court of Appeals stated that the period started on the latest date that either the prosecutor or the court is served with the prisoner's self-help IAD papers. *People v. Bielicki*, 588 P.2d 377 (Colo. App. 1978). Where the IAD request was received by the prosecutor on July 30, but the prosecutor did not file a copy with the district court until August 3, the 180-day time period began on August 3. *Id.* at 378. This is anomalous because no other court has ever imposed such a requirement. It is also ironic because the prosecutor's office itself caused the delay.

In several cases court have held that the IAD was never properly invoked because the prisoner's REQUEST FOR DISPOSITION was deficient. *McCallum v. State*, 407

So.2d at 869; *People v. Daily*, 46 Ill. App. 3d 195, 360 N.E.2d 1131 (1977) (courts do not require strict compliance with the agreement by a prisoner, but require a good faith, diligent effort to invoke the statute); *Hines v. State*, 58 Md.App. 637, 473 A.2d 1335 (1984) (no IAD violation because notice sent by defendant to prosecutor did not conform to requirements of IAD); *State v. Thompson*, 186 Ga. App. 379, 367 S.E.2d 247 (1988) (period did not begin to run until prosecutor received warden's certificate of inmate status).

The supreme court of Rhode Island held that a defendant was not entitled to dismissal under the IAD where the prosecutor never received the REQUEST FOR DISPOSITION. *State v. Dufault*, 540 A.2d 355, 356 (R.I. 1988). This would be easy to dismiss as a case where the defendant was attempting to bypass the prison officials in the sending state and the notice requirement was not met. The analysis is problematic because the court relates that the defendant attached an affidavit from a prison official in the sending state that indicated that the defendant mailed the notice when he said he did. The court does not discuss this aspect.

There is another difficulty with *Dufault*. Dufault filed a motion to dismiss on IAD grounds on June 19, 1985. *Id.* at 355. An affidavit alleging the mailing of a REQUEST FOR DISPOSITION in September 1984 was attached to the motion. On December 11, 1985, he filed a second motion to dismiss. *Id.* at 356. This was 175 days after the June 19, 1985 motion was filed. If the prosecutor did not receive actual notice when the REQUEST FOR DISPOSITION was mailed, he was certainly put on notice when the first motion was filed. There is no indication that the



state was prepared to try the case within five days of December 11. The court decided that the Rhode Island legislature did not intend that prisoners should have their cases dismissed "because their request and notice was either lost or delayed in the mail." *Id.* at 356. The court sidestepped the crucial issue of actual notice and ignored the clear intent of the legislature to provide dismissal as a means of enforcing the deadlines provided in the IAD. The dismissal sanction was adopted as essential to guarantee compliance with the statutory mandate, not to protect the Defendant from being prejudiced. *Nelms v. State*, 532 S.W.2d 923 (Tenn. 1976).

Because the inmate is assuming the responsibility of providing the notice to the prosecutor, it is reasonable to start the clock only when the prosecutor receives the notice and only if it meets the minimum requirement of providing the basic information needed by the prosecutor. In this case, the Petitioner tendered the REQUEST FOR DISPOSITION to the prison administration. It is unreasonable to delay the start of the 180-day period until the prosecutor actually receives the notice when the burden is on officials in the sending state to transmit it. More importantly, prisoner self-help cases in which the court holds that the request is only effective on receipt by the prosecutor should not be considered as supporting the proposition urged by the Respondent.

## D. CASES ON WHICH RESPONDENT RELIES

There is a core of cases that hold that the 180-day time limit is measured from the date the prosecutor receives the REQUEST FOR DISPOSITION from the

authorities in the sending state, not the date that the prisoner tenders it to them.

In one Kansas Supreme Court case, the REQUEST FOR DISPOSITION was received four days after the inmate mailed it. *State v. White*, 234 Kan. 340, 673 P.2d 1106 (1983). He was tried 182 days after the request was received by the court clerk. The 180th day fell on Saturday. The trial was 186 days after the defendant tendered the request to prison authorities. The court held that the trial was within the time limit. *Id.* at 347, 673 P.2d at 1111.

In a New Jersey case, the REQUEST FOR DISPOSITION was mailed the day after the prisoner tendered it to prison authorities and the date of receipt by the prosecutor was five days later. *State v. Ternaku*, 156 N.J. Super. 30, 32, 383 A.2d 437, 438 (1978). The defendant was at first represented by appointed counsel, but retained an attorney related to the trial judge by marriage. The trial judge recused himself and the case was sent to a judge in another county. The defendant moved to dismiss the case 186 days after he tendered the REQUEST FOR DISPOSITION to the prison authorities, but only 180 days after it was received by the prosecutor. *Id.* at 32, 383 A.2d at 438. The court found that the latter date was controlling. The court could as easily have determined that there was a period of excludable delay due to the action of the defendant.

*White* and *Ternaku* are the only cases in which the prisoner tendered the REQUEST FOR DISPOSITION to prison authorities and the delay was the normal mail delivery period. The other cases involved significant



periods of unexplained procrastination by the sending state authorities, as does this case.

In one case, sending state authorities delayed for two months. *People v. Wilson*, 69 Cal. App.3d 631, 138 Cal. Rptr. 259 (1977). During that time, the defendant attempted to serve the prosecutor directly. *Id.* at 634, 138 Cal.Rptr. 260. The court held that the prisoner's self-help was ineffectual, but remanded the case for a hearing to determine the reasonableness of the delay. This case flatly contradicts the requirement of Art. III(d) that the official of the sending state transmit the REQUEST FOR DISPOSITION "forthwith." IAD, Art. III(d), 18 U.S.C.A. App. § 2.

The U.S. Seventh Circuit Court was confronted with a case in which there were numerous periods of excludable delay. *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988). The court of appeals counted the 180-day time period from the date that the U.S. Attorney received the defendant's REQUEST FOR DISPOSITION, rather than the date the defendant tendered it to the prison officials. *Id.* at 1516. However, this was merely dictum. The trial was within 180 days of either date, after subtracting excludable delays.

A case which closely parallels the present circumstances was decided by the Connecticut Supreme Court. *State v. Braswell*, 194 Conn. 297, 481 A.2d 413 (1984). The court held that the 180-day limit was not violated when the defendant's trial commenced 164 days after the prosecutor in the receiving state received the request, despite the fact that 189 days had passed since the forms had been given to prison authorities in the sending state. *Id.*

at 300, 481 A.2d at 418. The court recognized that the prison authorities are the agents of the prosecutor in the receiving state. *Id.* at 299, 481 A.2d at 418. Thus, the conclusion that the defendant should bear the burden of the delay in transmitting the REQUEST FOR DISPOSITION is indefensible.

As here, much of the 25-day delay in *Braswell* must be attributed to failure of the prison authorities to mail the REQUEST FOR DISPOSITION. It was sent certified mail, but the postmark was illegible. A postal superintendent testified that the envelope bore evidence of misdirection, but this only accounted for four to six days of delay. *Id.* at 301, 481 A.2d at 416. It is extremely hard to believe that the prison mailroom would not have a record of sending the certified envelope.

The Exclusionary Rule is not intended to impede the prosecution of the guilty, although that is a secondary effect. The protection of the innocent from unreasonable police intrusion and the preservation of the integrity of the criminal justice system are so important that the injustice of the secondary effect must be tolerated. Similarly, the rule requiring dismissal for failure to adhere to the 180-day deadline is not intended to let miscreants off, but to enforce prompt prosecution. The interpretation urged by the Respondent would frustrate the higher purpose. If the Court adopts the Respondent's position there would be neither a legal nor a practical limit on the length of time prison authorities could delay forwarding a REQUEST FOR DISPOSITION under the IAD.

The interpretation urged by the Petitioner, and adopted by numerous courts, would not impede the



orderly administration of justice. The prosecutor would lose no more than the few days it takes for mail to be delivered. Where there is a lengthy delay in delivery, or where the REQUEST FOR DISPOSITION is lost in the mail, Art. III(a) permits the prosecutor to request a continuance. IAD, Art. III(a), 18 U.S.C.A. App. § 2. The prosecutor should experience little difficulty in showing the date on which the request was mailed and the date on which it was received, or that it was never received. The defendant would not be forced to prove that an unexplained delay was occasioned by prison authorities when all of the evidence in question is in the hands of an adversary.

The Court is not bound by the decisions of the lower courts, but the Petitioner urges the Court not to overrule the clear weight of authority supporting the Petitioner's position. The Petitioner urges this court to adopt the rule stated by Judge Milonas of the New York County Supreme Court in 1978. He stated, "Other than providing prison officials with the required notice, which the defendant must undertake to do, the duty of carrying out the statutory provisions belongs entirely to the authorities involved." *People v. Diaz*, 94 Misc.2d 1010, 1012, 406 N.Y.S.2d 239, 241 (1978).

While the IAD is not intended to prevent the just prosecution of a miscreant, the negative effect of delays on rehabilitation is an important social concern. The legislature reports clearly show this concern. They state, in part, as follows:

> The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged

by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound prerelease program.

S.Rep.No. 1356, 91st Cong., 2d Sess. 3, H.R.Rep.No. 1018, 91st Cong., 2d Sess. 3 (1970), 1970 U.S.CODE CONG. & ADMIN. NEWS 4864, 4866.

Philip Brasfield had some pithy comments on the conditions of those in prison. He stated as follows:

> Prisons hurt, maim, and kill. Prisons demoralize and feed the self-hatred generated by failed human potential. To be a person caged, shackled, and bound is a humiliation which makes one feel subhuman. The slow and methodical rape of the spirit continues day after day: men and women inside our prisons are convinced that they have no worth, no purpose, no hope, no rights, no change. For too many, that terrible lie becomes truth, a prophesy fulfilled in a thousand ways each day and night.



Philip Brasfield, *The Other Side*, May/June 1990. Notwithstanding reputed "country club" prisons, the living conditions of nearly all prisoners are dire, if not desperate. It is not necessary to aggravate these conditions by allowing detainers to lie fallow.

## II

**THE MICHIGAN SUPREME COURT ERRED IN THAT IT NEITHER HELD THAT THE 180-DAY PERIOD IN WHICH A DEFENDANT MUST BE BROUGHT TO TRIAL UNDER THE IAD BEGAN BEFORE THE PETITIONER WAS NOTIFIED OF A DETAINER BECAUSE HE WAS IMPRISONED FOR SEVERAL MONTHS WHILE THERE WAS A PENDING ARREST WARRANT OF WHICH THE PRISON AUTHORITIES HAD KNOWLEDGE NOR REMANDED THE CASE FOR A HEARING TO DETERMINE WHETHER ANY DELAY WAS REASONABLE.**

The criminal complaint was filed in Circuit Court on February 29, 1988. COMPLAINT, Jt. App. at 2. The Defendant's rights under the IAD should have become effective when he was sentenced in April or May of 1988. Since he was not informed of his rights under the IAD until September 7th, 1988, several months after the detainer was placed on him, he was unable to request disposition. However, he did submit his written REQUEST FOR DISPOSITION to Indiana prison authorities on that date. On September 9, 1988, there was a letter attached to the prosecutor's answer from Michael Broglin, Superintendent of the Westville Correctional Center, regarding the Defendant and the documents he had signed. Tr. at 4. Whether the letter was transmitted to the prosecutor is unknown. However, a letter was sent from the Indiana

Prison authorities on September 20th, postmarked September 22, which contained the Defendant's REQUEST FOR DISPOSITION. It appears to have been received in Jackson, Michigan on September 26, 1988. Tr. at 4.

The fact that a prisoner has a "hold" or detainer placed against him often results in increased duration and harsher conditions of confinement. *Smith v. Hooey,* 383 U.S. 374 (1969). In counsel's experience, the result is not merely increased punishment, but delayed rehabilitation, since the availability of training and employment programs decreases as the level of custody increases.

Section (c) of Art. III of the IAD states the following:

> The warden, commissioner of corrections or other official having custody of the prisoner **shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition** of the indictment, information or complaint on which the detainer is based. (emphasis added).

IAD, Art. III(c), 18 U.S.C.A. App. § 2.

The IAD provisions are triggered only after a "detainer" is filed with the custodial state by the state having untried pending charges. *People v. Paulus,* 115 Mich. App. 183, 320 N.W.2d 337 (1982). A detainer is a "notification filed with the institution where a prisoner is serving a sentence advising him that he is wanted to face pending criminal charges in the notifying state." *Id.* at 186. Therefore, the first thing to determine is when the detainer was filed against the Defendant.



On February 29, 1988, the 12th District Court of Jackson, Michigan had record of where the Defendant was located. A warrant was filed which showed that the Defendant was in the Fort Wayne, Indiana jail. It flies in the face of counsel's experience to suggest that Michigan did not have a detainer placed on the Defendant with the Indiana court. To believe that the Defendant would have been permitted his freedom if the Indiana prosecution had ended in dismissal or acquittal is unthinkable. Therefore, the detainer and the Defendant's rights under the IAD, vested at his sentencing.

According to the IAD, once the detainer was placed on the Defendant, the Indiana prison authorities were obligated to inform the Defendant of his right to final disposition without delay. The prisoner must be informed of his rights under the IAD, but he in turn must sign the appropriate forms to notify both the prosecuting attorney and trial court of his whereabouts and his decision to invoke his right to REQUEST FOR DISPOSITION. This method guarantees all parties an equal opportunity to protect their rights. *Edmonds v. Corrections Department,* 78 Mich. App. 196, 203, 259 N.W.2d 423, 427 (1977). In *People v. Office,* the Defendant was informed by the Wisconsin authorities that a detainer had been lodged against him, but he was denied the opportunity to request final disposition because the portion of the form allowing him this request had been crossed out. Therefore, the Defendant did not have knowledge of his rights under the Detainer Act. *People v. Office,* 126 Mich. App. 597, 603, 337 N.W.2d 593, 595 (1983). The court recognized that once a detainer has been filed, failure to bring formal charges violates the good faith and spirit of the IAD as it keeps the Defendant

from asserting his rights under the Act. *Id.* at 603, 337 N.W.2d at 595. Failure to inform the Defendant of his rights was a violation of Article III(c) of the IAD. *Id.* at 603-604, 337 N.W.2d at 595-596.

Here, the detainer was placed on the Defendant in April of 1988, yet he was not informed of this until September 7, 1988; almost six months later. This is a flagrant violation of the Detainer Act. Tr. at 5. A prisoner should not be penalized if the prison officials fail to carry out their duties under the IAD. *People v. Bowman,* 189 Mich. App. 215, 218-219, 472 N.W.2d 645, 647 (1991). By placing the burden of compliance on the officials of the sending and receiving states, the remedial objectives of the IAD will not be thwarted by contributory inaction of the sister states. *Nelms v. State,* 532 S.W.2d 923 (Tenn. 1976). The burden of the violation by the officials in the sister state should fall on the shoulders of the prosecutor. *People v. Marshall,* 170 Mich. App. 269, 277, 428 N.W.2d 39, 42 (1988). Therefore, the delay must be attributed to the prosecution.

Since the Defendant was not promptly advised of his rights under the IAD, he was denied equal protection under the law. The 180 day limit should have started to run from the date of the Defendant's sentencing in April of 1988 and would have ended in October of 1988. The Michigan Supreme Court's decision that the 180 days does not begin until September 26, 1988 was in error.

This issue was raised in the trial court. Tr. at 5-6. It was again urged in the Michigan Court of Appeals. *People v. Fex,* No. 119192, Appellant's Brief at 5. The court of appeals did not reach this issue since it held that the 180-



day time limit started on the day he tendered the REQUEST FOR DISPOSITION to Indiana authorities. The issue was presented to the Michigan Supreme Court. *People v. Fex,* No. 91979, Brief Opposing Application for Leave to Appeal at 4-5. The court rejected the Petitioner's argument on this issue. *People v. Fex,* 439 Mich. 117, 123 n. 9, 479 N.W.2d 625, 628 n. 9 (1992). The issue has been properly reserved for decision by this Court.

## CONCLUSION

A prisoner need only convey the written notice and request to appropriate prison officials to fulfill the requirements of the IAD. Service should be complete when the prisoner tenders the request to his warden's representative and the 180-day period under the IAD should begin to run. Respondent contends that the period does not run until the request is received by the Prosecutor in the receiving state. Petitioner urges that the period should begin when the prisoner tenders the request to prison authorities in the sending state. There are decisions supporting both sides, but the Petitioner's position represents both the majority and the correct view.

Calculating the 180-day period from the date the defendant tenders the request to prison authorities prevents sending state officials from diluting or vitiating the inmate's right to speedy trial once invoked. Fairness requires the burden of compliance with the requirements of the IAD to be placed entirely on the law enforcement officials involved, since the prisoner has little ability to

enforce compliance other than after the fact. The interpretation urged by the Petitioner, and adopted by numerous courts, would not impede the orderly administration of justice. The prosecutor would lose no more than the few days it takes for mail to be delivered. Where there is a lengthy delay in delivery, or where the request is lost in the mail, the IAD permits the prosecutor to request a continuance. The prosecutor should experience little difficulty in showing the date on which the request was mailed and the date on which it was received, or that it was never received.

The Defendant was not informed of his right under the IAD until several months after he had been sentenced while there was a pending detainer from another state. The IAD provisions are triggered when a "detainer" is filed with the custodial state by the state having untried pending charges. A detainer is a "notification filed with the institution where a prisoner is serving a sentence advising him that he is wanted to face pending criminal charges in the notifying state."

According to the IAD, once the detainer was placed on the Defendant, the Indiana prison authorities were obligated to inform the Defendant of his right to final disposition without delay. Petitioner should not be penalized if prison officials fail to carry out their duties under the IAD. The burden of the violation by the officials in the sister state should fall on the shoulders of the prosecutor. Therefore, the delay must be attributed to the prosecution. The 180-day limit should have started to run from the date of the Defendant's sentencing. The Michigan Supreme Court's decision that the 180 days did not begin until the prosecutor received the request was error.



For these reasons, Petitioner requests that this Court REVERSE the decision of the Michigan Supreme Court and REMAND his case with instructions to DISMISS the prosecution for violation of the 180-day time limit of the Interstate Agreement on Detainers.

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